

The Client Protection Webb*

A Publication of the National
Client Protection Organization

July, 2016

NCPO Asks Members to Complete Online Survey

NCPO's board decided at its June meeting to update its Strategic Plan this summer. The effort will help NCPO to establish new goals and directions. Prior Strategic Planning efforts resulted in the establishment of the Workshop Assistance Program, formation of NCPO's Speakers Bureau, and the conversion of NCPO's newsletter to an electronic format. NCPO asks members, and others involved in client protection work, to participate in a short on-line survey. It



should not take more than five minutes or so to respond to it. Your input will help NCPO decide on its future

direction and programs, so we ask that everyone make an effort to respond to the survey. Participants will be entered into a drawing for a free NCPO individual membership for FY 2017-2018.

The survey link will remain active until 8/31/16. **Thanks for participating.**

Please click on this link to complete the survey:

www.surveymonkey.com/r/NCPO-SP

New Look for NCPO Website

The NCPO is excited to announce the launch of its revamped website. Stop by at www.ncpo.org and see our new design! You can access information about upcoming meetings, things to do during the Regional Workshop, and find past issues of the Webb! If you have any photos of past events, useful documents, marketing materials, or anything else that would benefit our members, please send them to Alecia Ruswinckel at amruswinckel@mail.michbar.org.

Money, Tech & Mo' in Detroit

NCPO Workshop Goes to Michigan Sept. 26 - 27



The Michigan Client Protection Fund is looking forward to hosting the NCPO Fall Workshop on September 26 and 27, 2016 in the Motor City! We have been working diligently to bring you a stellar lineup and information regarding activities and events in the area. The workshop will take place at the Renaissance Center, which has everything you need for your stay, including lodging, food, and shopping on the riverfront.

Topics include **“Mo’ Money–Avenues of Recovery,”** where you will hear from an attorney who represents claimants, as well as the Fund, in actions against financial institutions and notaries, and an attorney who represents bonding companies. Other sessions are: **“Where’s My Money?”** **“Managing Client Expectations”** **“The Client Protection What?”** and more!

Now that you are tempted to join us, go to <http://ncpo.org/regionalworkshop.html> to see the full lineup, overview, to do's in Michigan, and register. (You do not need to be an NCPO member to attend.) If your Fund is on a tight budget, consider applying for a grant from NCPO of up to \$1,000 to help defray the cost of attending the Forum. Applications will be assessed based on financial need, and must be received not later than 90 days before the Forum. For details, and to apply, visit www.ncpo.org/page12.html

We hope that you join us for a wonderful two days in beautiful Michigan!

Michigan Fund Celebrates Its First 50

This year the State Bar of Michigan's Client Protection Fund turned the big 5-0! The Fund was established on February 25, 1966, by the State Bar of Michigan's Board of Commissioners.¹ Since its inception,² 1,237 claims have been paid totaling \$7,879,760.90.

During the 2015-2016 bar year, the Board approved \$354,570.23 in payments.³ This total does not include several claims which are being held because the total number of claims involving the dishonesty of a single lawyer are expected to exceed the aggregate limit. While the numbers are concerning, the number of lawyers against whom claims are filed represent only .06% of the lawyers in the State of Michigan.

In 1991, the reimbursement caps were \$25,000 per claimant with a \$100,000 aggregate maximum. The caps increased in 2003 to \$50,000 per claimant, with a \$200,000 aggregate maximum. The current caps of \$150,000 per claimant and \$375,000 per lawyer, or group of lawyers acting in collusion, were established in 2014.

Since 2003, the Fund has been financed by a direct annual assessment of \$15.00 from each active Michigan attorney and \$7.50 from each inactive attorney, as well as attorneys admitted pro hac vice. This change to the assessment method of financing brought Michigan in line with the majority of states that finance their client protection funds through direct assessments from lawyers. The assessment method has helped the Fund achieve an appropriate

reserve. From 2003 through 2014, the Fund grew from \$785,000 to just over \$2.5 million. Prior to 2003, the Fund received appropriations from the State Bar of Michigan.

Over the years, there have been changes to the CPF Rules and the Michigan Rules of Professional Conduct to improve the claims administration process and to reduce the potential for undetected misappropriation.

In November 2009, the Board of Commissioners approved amendments to the CPF Rule 1(A) to further clarify the Fund's "purpose and scope" statement. The 2009 amendments also included changes to CPF Rule 9(C)(3) to remove the contingency fee limitation and expand its application to misappropriation of settlement proceeds.

On September 15, 2010, the Trust Account Overdraft Notification ("TAON") rule took effect. The TAON rule is intended to serve as an early warning sign for potential misappropriation of client or third party funds held in trust by a lawyer. The Michigan Supreme Court adopted the TAON Rule on December 15, 2009, based on a 2008 proposal by the State Bar of Michigan as a result of recommendations made by the Standing Committee.

On July 24, 2015, the Board of Commissioners approved amendments to CPF Rule 11 to embrace the use of plain language rather than legalese to describe the review process when a claimant or respondent objects to a claim determination. These amendments also streamlined the review process and clarified the standard of review as well as the required burden of proof.



¹ www.michbar.org/client/protectionfund

² Through March 31, 2016.

³ www.michbar.org/generalinfo/clientprotectionfund

Presidential Perspectives

New Leadership for NCPO

By Kathryn Peifer Morgan, NCPO President & Executive Director of the Pennsylvania Lawyers' Fund for Client Security

I am incredibly honored and humbled to be able to serve as the tenth President of the National Client Protection Organization. Having been involved with client protection for just shy of 20 years, I know what a valuable resource NCPO is to those who serve in this field, as well as to those who want to learn more about client protection.

I would like to thank Michael J. Knight Sr., the immediate Past-President of NCPO, for his support and mentorship during the last two years. I look forward to receiving his wisdom and counsel, as well as his wonderful sense of humor for stress release, during the next two years. On behalf of the Officers, Board, and Membership of NCPO, thank you Mike, for your superb service to the organization during your tenure as Counsel, President-Elect, and President of NCPO.

NCPO is starting out the new fiscal year with a new look for the website. Many thanks to Alecia Ruswinkel, Professional Standards Assistant Counsel for the State Bar of Michigan, for taking on this project and delivering a great site! Please check out the site and provide Alecia with photos of meetings and events in your jurisdictions. NCPO is also engaging in strategic planning in order to have your organization grow and

continue to provide valuable information to you, the members.



Additional information about the survey is contained in this newsletter. I would urge everyone to take the survey. The information obtained through the

survey will be crucial to the growth and development of NCPO.

Finally, please read the information in this newsletter and on the website about NCPO's workshop being held on September 26-27, 2016 in Detroit, Michigan. We look forward to seeing everyone in the Motor City. Don't forget about NCPO's Workshop Assistance Program which provides financial assistance for attendance at the workshop. Additional information may be obtained on NCPO's website. The application process and granting of workshop assistance is confidential.

Thank you for the opportunity to serve, and for being a part of NCPO!



Trustee Named Attorney General of Alaska

Jahna Lindemuth was tapped to be the next Attorney General of Alaska on July 4, 2016 by Alaska Governor Bill Walker. Lindemuth, a partner at the Anchorage law firm of Dorsey & Whitney, has served on the Alaska Bar Association's Lawyers' Fund for Client Protection Committee for the past three years. She is also the second woman to serve as Alaska's Attorney General.

Funds in Motion – News from the Front Line

Thirty-five jurisdictions reported on their respective states of affairs at the Town Hall held in Philadelphia, Pennsylvania on June 3, 2016. Here's a round-up of what's happening in some of NCPO's member funds across the country. Please let us know what's going on in your state. Submissions can be made to newsletter editor Mike McCormick at michael.mccormick@njcourts.gov, or better yet, come to Detroit on September 26, 2016, and tell us yourself!

Upper Canada is anticipating its first per claimant award increase since 1988. Although still under discussion, the Fund may even completely remove its per claimant maximum, which currently stands at \$150,000.

Minnesota is struggling with claims made against deceased attorneys. It is also examining its refundable fee rule and considering new regulations for unearned fees.

Kentucky is awaiting the election of a new chair, after “major trustee turnover,” and wants to increase its reserve. The Fund is currently supported by a \$7 annual attorney assessment.

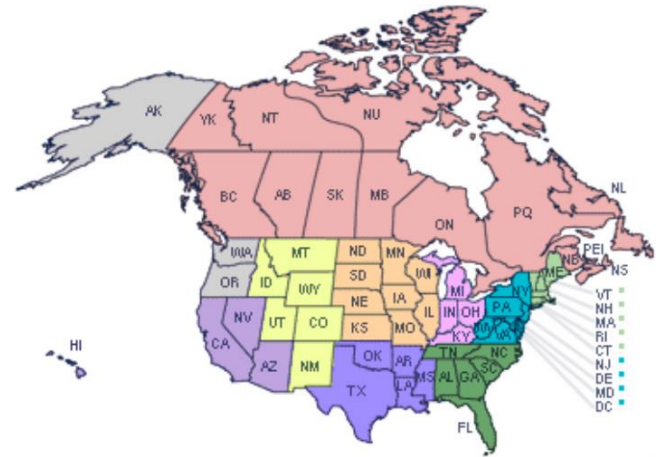
The District of Columbia announced that it has been authorized to consider claims made against active attorneys. All that is needed for Fund jurisdiction is admission to the D.C. Bar.

The Virgin Islands continues in its quest to establish the framework for its fund. Its Supreme Court is in the process of adopting new rules and a registration program which will support the client protection program.

Tennessee has a new website, which may have contributed to new claims alleging losses of \$1.1 million. The Fund only receives \$225,000 a year and is rapidly depleting its reserves.

New Jersey has asked its Supreme Court for a rule amendment which would allow the Fund to consider unearned retainer claims against attorneys who accept the retainers, but then die before completing the work, and leave no money

behind for a refund. New Jersey does not require that unearned retainers be kept in trust.



New Mexico may raise its per claimant cap to \$50,000. Although most claims in the past have been in the \$1,500 to \$5,000 range, several larger claims have recently been filed.

Virginia is hoping to revise its rules to allow it to invest part of its \$8 million reserve. It also is looking into doing more to increase its subrogation receipts.

Colorado said it was “flush with cash” and was working on amending its rules to require that clients be notified whenever their attorney receives settlement proceeds on their behalf.

Idaho just increased its per claimant cap to \$1 million and is considering waiving its annual assessment for one year because the size of its reserve is increasing.

North Carolina won its bankruptcy challenge and can consider claims that had been stayed because of their connection to pending bankruptcy cases.

Wisconsin is readying its petition to increase its annual assessment, which currently stands at \$20. “A few huge claims are the problem,” which have caused some successful claimants to wait months to actually receive their awards

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Funds in Motion –

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Massachusetts is enjoying success in independently managing its \$8 million reserve and is in the process of interviewing banks to determine which one can best help it to do so.

New York paid \$12.3 million in claims this year, the largest amount in its 34 year history. It also recovered \$800,000 in restitution. The Fund is seeing an increase in losses attributable to misappropriation of client settlements.

Ohio is struggling with over 50 claims against a single immigration lawyer whose clients speak at least five different languages (other than English), and who, for the most part, have left the country. Claimants have asked that awards made to them not be paid by check because they fear theft in the mails of their native countries. The Fund is asking its court for guidance on paying the awards by electronic transfers.

Oregon noted that, after its reserves were depleted a few years ago, the annual assessment for lawyers was increased from \$15 to \$45. Better times now, however, have led the court to take the assessment back down to \$15, with the threat that it may yet go lower. Instability of the assessment is leading the Fund to consider how it can develop its subrogation receipts.

Missouri is seeking a rule amendment which would allow it to take over the accounts of deceased attorneys. The number of claims is currently down.

Hawaii has 19 open claims, and has increased its per claimant limit from \$50,000 to \$100,000, and its respondent maximum from \$150,000 to \$300,000. It is working on compiling a book of precedents to provide guidance to its trustees.

California paid \$26 million in claims this year, but has a \$17 million deficit, since it receives just \$6 million per year in revenue. A tax increase may be on the horizon.

Michigan is facing its first ever bankruptcy trustee objection to its request that a respondent debt be non-dischargeable. It also just finished revising its rules for appealing Fund decisions.

Illinois had five respondents this year who depleted its reserves, one of whom led to 365 claims and awards of over \$2 million. The Fund recently raised its per claimant cap to \$100,000. So far this year, it has paid out \$3 million.

New Brunswick (Canada) said it has received about a dozen claims this year, and expects to make awards in three or four of them. Most of the claims arise from unearned retainer disputes.

Texas is struggling with a “sunset justification process,” which requires it to justify its existence every single year to the state legislature. The Fund is also attempting to institute payee notification (which it believes is unlikely) as well as overdraft notification (for which it is hopeful).

Maryland has claims against two respondents who appear to have stolen \$2 million. Its reserve is down to \$7 million.

Alabama reported that has a \$3 million reserve, based largely on its “outstanding investment portfolio.” It also collects an annual attorney registration fee of \$25.

Georgia received an extra \$500,000 appropriation this year because it has already paid out \$495,000 in claims.

Pennsylvania has paid out \$4.4 million this year and was sued by a bank which claimed it did not handle claims quickly enough. The Fund prevailed when the court dismissed the suit. The Fund is working on developing more support from the members of its Supreme Court.

Washington is hoping to be able to raise its per claimant cap in the near future. It currently pays \$5,000 of each award at the time of its approval, then waits until the end of the year to pay the balance – or pro-rate the award if reserves are low.

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Funds in Motion....

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Kansas is attempting to find solutions for claims arising from immigration attorneys who, although not admitted to the Kansas bar, are permitted to cross state lines to practice.

Arkansas is pleased with the results of an ABA study of their state's disciplinary system, including the Fund, which made recommendations for improvement to their Supreme Court. It suggests that the process be undertaken every ten years.



Arkansas' Mike Harmon Receives Hecht Award

Michael Harmon, Deputy Director for the Office of Professional Conduct, and staff attorney to the Arkansas Client Security Fund, was honored as the 2016 recipient of the NCPO's Isaac Hecht Law Client Protection Award. Mike was presented with the award during the ABA's 32nd annual Law Client Protection Forum in Philadelphia. He has served as a member of the American Bar Association's Standing Committee on Client Protection and has spoken on Client Protection matters at national forums and numerous continuing legal education seminars in Arkansas. He has also served as an NCPO Regional Vice President, and was recently selected as the NCPO President-elect for 2016-2018.

Mike has been instrumental in improving the Arkansas Fund, recently securing an ABA Consultation for the Arkansas Client Security program. Supporters noted that "There was a time when the Arkansas Fund was depleted (and) under Michael's leadership, the Arkansas Client Security Fund increased its overall fund balance to an amount over one million dollars....Through his hard work, Michael has

promoted the excellence of the Arkansas Committee and has ensured that it will remain a viable and crucial component of the Arkansas legal community."



Outgoing NCPO President Mike Knight presents the Hecht Award to Michael Harmon in Philadelphia on June 3, 2016.

The Hecht Award Committee noted that Mike's work is particularly important because he is responsible for lawyer discipline as well as client protection. "He does so much with very little support. He is extremely passionate about client protection, and has worked extremely hard to make sure that the Arkansas Client Security Fund remains a priority for the Court."

The Hecht Award honors the memory of Isaac Hecht, a trustee and treasurer of the Maryland Fund from its creation in 1967 until his passing in 2003 at the age of 89. A frequent lecturer and writer on issues dealing with legal ethics, Mr. Hecht especially focused on the financial

foundations of client protection funds, the initiatives of fund leaders, and their receptivity to techniques to deter, and detect, dishonest conduct in the practice of law. The award continues Mr. Hecht's legacy of excellence in client protection.

Ten Years Later, “Standards” Still the Goal



Editor's Note: "Standards for Evaluating Lawyers' Funds for Client Protection" were adopted by the NCPO on June 2, 2006 to help jurisdictions address the fundamental question of client protection: "Is the need being met?" During NCPO's annual meeting in Philadelphia this year, former New Jersey Director, and now Judge, Kenneth J. Bossong noted that the Standards still need to be implemented in many states. He noted that the U.S. Conference of Chief Justices adopted the Standards in

their entirety in July, 2013, an important imprimatur which should encourage their use in the daily functioning of funds nationwide. Following is a reprint of the Introduction to the Standards written by Judge Bossong at the time of their first printing in April, 2007. Please take some time to review the Standards at <http://ncpo.org/NCPO%20Standards.booklet.final.pdf>

[The Standards for Evaluating Lawyers' Funds for Client Protection were] born of hundreds of discussions over many years. Whether formal presentations or off-the-cuff remarks, and whether in-person, over the phone or via e-mail, these exchanges have dealt with the obstacles encountered to doing client protection well, or even at all.

Those obstacles are many and they are persistent. That they utterly lack merit does not deter persons who invoke them to prevent assistance to victims of dishonest lawyers. When that is permitted to happen, it matters little to clients whether the harm to them is perpetuated deliberately or inadvertently. This is what those who work for client protection funds discuss when they have the opportunity: What prevents us from doing what ought to be done? What should be done? What works?

What does not work is encountered over and over again:

- Our Fund does not pay that kind of claim because it cannot afford to.
- We reject every claim we can to preserve the Fund.
- A proposal to increase the limitation from \$5,000 to \$10,000 per claimant has been met with adamant opposition.
- We only meet and pay claims once (or twice) a year.
- Our Fund is a remedy of last resort; claimants must prove they have exhausted all other possible sources of recovery.
- We would ask that the annual assessment for the Fund increase from \$5 to \$7.50, but we know the lawyers would complain.

- Our Fund trustees "get it", but the powers-that-be don't.

- If the Fund ends the year with a reserve, the assessment is suspended until it's gone. (Or, the Fund's money is used for other purposes.)

- The Fund is considered just another state agency - or bar committee.

- All unearned retainer claims are fee disputes, which we don't pay.

- This year's Bar President is okay, but the President-Elect doesn't like the Fund.

- Our Fund could do better with more staff, but we share one part-time person with Bar Counsel, or CLE, or Fee Arbitration, or...

- We won't even look at any claim involving an investment; lawyers are not investment counselors.

And so on.

Funds exist because lawyers are honest by an overwhelming majority. It is simply unacceptable to honest lawyers that there be no remedy for clients who suffer solely for having given a lawyer their trust, especially since the system of justice depends upon such clients' trust and candor.

The same logic that compels Funds to exist commands them to be better than mediocre. When carefully considered, the obstacles to excellence in client protection reveal themselves to comprise faulty, often circular, reasoning combined with bad public policy. That a Fund rejects certain kinds of claims because it cannot afford to pay them (the first obstacle, above) explains nothing, of course. Why can't the Fund

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Standards *(continued)*

afford them? Because it has no assessment, or an assessment of \$5 or \$7.50 per year. Why does the Fund lack adequate resources? Because it has no control over its fiscal health and the powers-that-be do not support the Fund. Why don't they support the Fund? Because they don't understand it and they fear the lawyers will revolt. Do those in control really fear lawyers will "revolt" over paying the equivalent of one-twentieth to one-third of one billable hour, per year, to save innocent clients from ruin? They do not want lawyer complaints, especially since the Fund receives so few claims. Why no claims? No lawyers ever steal in your State? Nobody knows about the Fund. Why is that? It would be foolish to publicize a Fund that cannot afford to pay claims.

A sense of humor is helpful for those who work in client protection, but so is a steely resolve. There is always an answer from those who don't "get it", or from those who fear those who don't "get it". The fact that the answers to the why-not-do-this-well questions make no sense often seems not to matter. That is frustrating.

The Standards that follow take on the obstacles, and expose them for what they are. The aspirations guiding the Standards are provided by the Profession itself. That is to say, they are

principled and they are deliberately and appropriately set high. There is nowhere to hide in these Standards. Lack of funding, for example, is not an excuse for anything; it is a critical problem that must be solved. Falling short in one of the four major building blocks is as harmful to a Fund as a deficiency in any of the others.

Those four major building blocks (structure, funding, accessibility, and responsiveness) are imperatives. A Fund beholden to forces indifferent or hostile to its mission has no chance to achieve excellence. Independent structure with no funding yields contemptibly unfulfilled promise. If a Fund is securely in place with adequate funding, even these are small victories unless the Fund can be found and used by those who need it most.

Finally, all is for naught if a Fund simply fails to respond to the need of deserving claimants who find it. The Standards are built upon these truisms. The Standards provide detailed explication of what excellence in client protection demands. Setting them high means that readers from virtually every Fund in North America will find at least something disquieting in these Standards. Discomfort with inadequacy is appropriate. When improvement is the result, the Standards are working.

Closing the Gap to Legal Services

It is estimated that 80% of low income litigants – including those in 90% of family court cases – are unrepresented. A panel of experts shared some of the ways the judiciary is attempting to address this issue during the ABA's National Forum on Client Protection. An ABA study to be released in August will attempt to answer the question "How can technology and innovation help to address this problem? Some of the answers include focusing on

collaboration between lawyers and courts through online dispute resolution, and the development of an "innovation center" where parties can discuss changes needed to reduce litigant wait times and regulate "virtual law firms."

Particularly challenging is bankruptcy practice, where *pro se* Chapter 13 debtors are considered to have a "zero percent chance of success." The problem has been complicated by instances in

which attempts have been made to sell already discharged debts to other parties who then try to collect anew from the discharged debtor. The volume of cases filed – 850,000 last year alone – adds to the dilemma.

New York noted that it already has 25 self-help programs available, including a 35 foot "Mobile Justice Services Unit" to help unrepresented litigants with court forms and procedures.

“Trust” Not Always Fundamental in International Practice

The practice of law in other countries may differ significantly from the expectations of U.S. attorneys and their clients.

Increasing globalization requires an awareness of what may be happening beyond our borders. That was the message of the panel discussing the Globalization of Legal Practice at the recent ABA Forum in Philadelphia.

Mexico was cited as an extreme example, where anyone can practice law, even if they aren't a lawyer. The market is completely open; It's one part of the world where the concept of "trust" is not necessarily integral to the attorney-client relationship.

A more moderate approach in Wales allows non-lawyers to perform most, but not all, legal work, but requires malpractice insurance. In Nova Scotia, it is very common for lawyers to practice in multiple places without notice to the host jurisdictions. Canada does not have an attorney registration system, making it impossible to keep track of the activities of foreign attorneys. Outside the U.S., "compensation funds" largely provide client protection, either as funds of last resort, or as back-ups to insurance companies.

An Ounce of Prevention....

America – including the legal profession – is getting older, with about 10,000 Baby Boomers turning 65 every day. Rawle Andrews, Jr., Esq., Regional Vice President for AARP, noted that the median age of Americans is up from 39 in 1980 to 49 today. That's one reason why the AARP magazine, which circulates 36 million copies every month, frequently features attempts to educate seniors about elder abuse issues.

Andrews was part of an ABA Forum on Client Protection panel which focused on the effects of our aging attorney population. Programs for them are few, but clearly the problem has been recognized. In Illinois, for example, older lawyers may be offered the opportunity to "permanently retire" instead of facing disciplinary charges, so long as there is no evidence of theft or dishonest conduct. The District of Columbia has a similar "disability suspension" which can be used after complaints are filed. New Jersey's "Lawyers Assistance Program" could be broad enough to cover aging practitioners as well as those with addictions and other problems, but it is always hard to convince people to seek help. Maine has become the first state to require aging practitioners to name a proxy who can take over their practices "just in case." New York suggests this route, but does not yet require it.

In the meantime, clients can be severely prejudiced by an aging lawyer who can no longer do the job. Judges may actually be the first to notice a lawyers' reduced capabilities and report it to disciplinary authorities. Client protection funds may need to recognize that they exist to protect clients and address their injuries without regard to whether the conduct causing the injury was dishonest or as the result of an age-related incapacity.

**The Client Protection Webb is published in memory of Gilbert A. Webb, Esq., who served as Assistant Client Protection Counsel for the American Bar Association's Center for Professional Responsibility.*

Mr. Webb was dedicated to protecting the welfare of clients victimized by their attorneys and served as an editor of the ABA's first client protection newsletter. Submissions to the Webb are always welcome. Please send them to the editor, Mike McCormick at michael.mccormick@njcourts.gov.

